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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

DAVID JOE MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH OTHER DECISIONS OF THAT COURT ON THE SAME MATTER.

III. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

IV. WHETHER PETITIONER WAS DENIED HIS RIGHT UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO REMAIN SILENT WHEN THE DISTRICT COURT REFUSED TO SEVER COUNTS ONE AND TWO OF THE INDICTMENT.

V. WHETHER THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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DAVID JOE MARTIN,

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner DAVID JOE MARTIN respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Tenth Circuit on original submission on January 10, 1994 styled *United States v. Martin*, 15 F.3d 943 (10th Cir. 1994), and the opinion and judgment entered by the United States Court of Appeals for the Tenth Circuit on rehearing on April 4, 1994 styled *United States v. Martin*, 18 F.3d 1515 (10th Cir. 1994).

OPINIONS BELOW

The published opinion of the court of appeals on original submission, styled *United States v. Martin*, 15 F.3d 943 (10th Cir. 1994), (*Martin I*) was entered on January 10, 1994. A copy of the opinion is attached hereto as Appendix A. On February 10, 1994, the Court granted rehearing. The published opinion of the court of appeals on rehearing, styled *United States v. Martin*, 18 F.3d 1515 (10th Cir. 1994), (*Martin II*) was entered on April 4, 1994. A copy of the opinion is attached hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within ninety (90) days from April 4, 1994, the date on which the opinion and judgment of the United States Court of Appeals for the Tenth Circuit on rehearing was entered. SUP.CT.R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 18 U.S.C. § 3231.

On January 23, 1992, at approximately 5:05 p.m., Robert Wood (Wood) entered the border patrol checkpoint located on I-25 north of Las Cruces, New Mexico, driving a blue 1991 Dodge pickup truck with New Mexico license plates and almost hit an agent who was crossing the ramp. Wood stated that he was coming from Anthony, New Mexico, and going to Hatch, New Mexico, to look for some hay. After determining that Wood was a

United States citizen, Agent Miguel Estrada (Estrada) allowed him to proceed through the checkpoint.

At about the same time, Agent Francisco Velasco, Jr. (Velasco), who had observed Wood at the checkpoint, left with jumper cables on his way to Radium Springs to help a stranded officer. However, as Velasco arrived at the Radium Springs exit, he learned that the stranded officer no longer needed help. He proceeded back to the checkpoint via Highway 185. At approximately 5:25 p.m., Velasco observed Wood travelling "at a high rate of speed" southbound on Highway 185 about one mile north of the Blue Moon Bar. Velasco contacted Estrada at the checkpoint, who advised him that Wood had stated that he was going to Hatch, New Mexico, to look for some hay. Velasco turned around and located Wood's truck at the Blue Moon Bar, and also noticed a 1981 Chevrolet pickup truck with a camper shell bearing New Mexico license plates parked at the bar with "a lot of stuff in the back." The Blue Moon Bar was a "commonplace for aliens and drug smugglers and scout vehicles to stage and meet at that bar." As Velasco approached the bar, Wood's vehicle was leaving, headed south. The 1981 Chevrolet pickup truck was also leaving the bar and was headed in the same direction. Velasco turned around and began following the vehicles. He observed the vehicles traveling about 150 feet apart "going real slow." As Velasco approached, Wood's vehicle fled at a high rate of speed. Velasco passed the Chevrolet truck and, as he did, noticed various personal effects by the tailgate. A stipulation was entered into between the parties that the Martin truck was not "riding low." Velasco caught up with Wood's vehicle near mile marker 11, Highway 185 South

and stopped him by the Leasburg Mercantile Store. Wood produced a valid license and vehicle registration, and upon questioning, told Velasco that he had gone to "Hatch to look for some hay, but the guy wasn't there," and that he lived in Anthony. Velasco told Wood that he believed Wood was a "scout vehicle." He then told Wood to wait at his present location, that he was going to locate the Chevrolet pickup that had pulled out of the Blue Moon Bar and, retaining his license and registration, left in his vehicle. Velasco found the Chevrolet pickup about one mile north of the Leasburg Mercantile Store location traveling southbound "at a slow rate of speed." Velasco turned around and activated his emergency lights. The Chevrolet did not pull over immediately, but proceeded for about one half mile and was stopped at Wood's location. Velasco questioned the driver, appellant herein, if he knew Wood. Appellant stated that he did not know Wood. Appellant produced a valid license and vehicle registration which Velasco also retained. Velasco told the two individuals that he believed Wood was a scout vehicle for appellant, and that he also believed appellant was smuggling aliens or narcotics in his truck. Velasco requested permission and consent to search both vehicles. Wood consented, but appellant refused consent to search the bed of the pickup. Both Wood and appellant were restrained from leaving the area. Velasco requested a sniffer dog, the dog alerted to the tailgate of the pickup, and a subsequent search of the bed of the pickup revealed approximately 495 pounds of marijuana concealed therein.

On February 20, 1992, appellant[1] was charged by indictment issued by the grand jury for the District of New Mexico with possessing with the intent to distribute more than 100 kilograms of marijuana, a Schedule I controlled substance, in violation of Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and Title 18 U.S.C. § 2.

On March 18, 1992, a two-count superseding indictment was returned by the same grand jury charging appellant in Count I with possession with intent to distribute more than 100 kilograms of marijuana, and in Count II with carrying and using a firearm during a drug trafficking crime, to wit: conspiring to distribute more than 100 kilograms of marijuana, in violation of Title 18 U.S.C. § 924(c)(1).

On March 13, 1992, appellant filed a motion to suppress the evidence, alleging that all evidence discovered was the result of an illegal search and seizure conducted by border patrol agents (Doc. 10). On May 18, 1992, after an evidentiary hearing conducted on April 15, 1992, the district court denied said motion.

On May 1, 1992, appellant filed a motion to sever Counts I and II for trial. This motion was denied by the district court on July 28, 1992.

On August 5, 1992, following a jury trial that began two days earlier, appellant was found guilty as charged in both counts of the superseding indictment.

On October 28, 1992, the Court sentenced appellant to sixty (60) months imprisonment followed by four (4)

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[1] Wood was named as a codefendant.

years of supervised release as to Count I, and sixty (60) months imprisonment followed by three (3) years of supervised release as to Count II. The term of imprisonment imposed on Count II to run consecutive to the term of imprisonment imposed on Count I, and the terms of supervised release to run concurrent with each other.

On appeal, appellant argued that the discovery of marijuana was the result of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution; that the district court erred by failing to grant a severance of counts; and, that the district court erred by failing to grant appellant's requested jury instruction.

On original submission, a panel of the United States Court of Appeals for the Tenth Circuit affirmed appellant's convictions in a published opinion. *Martin I.* With respect to the search question, the Court, citing Fed. R. App. P. 30(a), 10th Cir. R. 30.1.1 referencing 10th Cir. R. 10.3 and in particular 10.3.2(d), initially stated that "Martin failed to include a transcript of the suppression hearing as part of his appendix on appeal." *Id.*, at p. 944. However, since appellant did not challenge the findings of fact by the district court, the Court relied on and adopted same. *Id.*, at p. 945. After discussing pertinent Tenth Circuit case law with respect to roving border patrol stops, the Court held that "based upon 'the whole picture,' *Sokolow*, that the Border Patrol agents had reasonable suspicion to stop Martin." *Id.*, at p. 951.

Turning to appellant's argument that the district court erred by failing to grant a severance of counts, the Court held:

> "When an appellant asserts that his conviction should be reversed because of a particular error but the record does not permit us to evaluate the claim, we will generally refuse to consider it. Here, the record on appeal does not include the trial transcript. Under these circumstances, we have no basis from which to determine whether the district court's denial of Martin's motion for a severance of counts gave rise to an abuse of discretion." (citation omitted).

Id., at p. 952

Likewise, with respect to appellant's argument that the district court erred by failing to grant appellant's requested jury instruction, the Court stated:

> "Although Martin contends that the court erred in refusing to give his proffered instruction on § 924(c), he has failed to include the jury instructions in the record on appeal. Under such circumstances, we cannot consider whether the court's failure to give his proffered instruction gave rise to error."

Id. Although the Court recognized that it had the discretion to supplement the record and thus properly determine the issues presented by appellant in his brief, the Court refused to do so. *Id.*, at p. 944-45.

Counsel for appellant filed a petition for rehearing alleging that because of a misunderstanding with respect to his interpretation of the 10th Circuit Rules, he did in fact fail to provide this Court with a proper record, and respectfully suggested that the Court exercise its discretion to supplement the record to allow a complete review of appellant's convictions. The Court granted rehearing with respect to whether the district court erred in failing

to grant a severance of counts and in failing to give his proffered instruction on § 924(c)(1), but denied rehearing as to whether the discovery of marijuana was the result of an illegal search and seizure, having reached the merits of that issue in *Martin I*. *See Martin II*, at p. 1516.

On rehearing, the same panel of the United States Court of Appeals for the Tenth Circuit again affirmed appellant's convictions in a published opinion. *Martin II*. With respect to whether the district court erred by failing to order a severance of counts, the Court held that appellant had failed to establish that he had "both important testimony to give concerning one count and a strong need to refrain from testifying on the other." *Id.*, at p. 1519. And, with respect to whether the district court erred by failing to give his requested jury instruction on § 924(c)(1), the Court held that the jury was provided with an accurate statement of the law. *Id.*, at p. 1520.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has held that "[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the Country." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574,

2582, 45 L.Ed.2d 607 (1975). *See also United States v. Ortiz*, 422 U.S. 891, 896-97, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975). The same requirement must be met if the vehicle contains contraband rather than illegal aliens. *United States v. Cortez*, 449 U.S. 411, 422, 101 S.Ct. 690, 697, 66 L.Ed.2d 621 (1981) (referring to reasonable suspicion of "criminal activity" generally rather than transportation of illegal aliens specifically). The stop in the present case was not a border search and can only be justified as a brief investigatory detention (also known as "Terry" detentions). *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In order to justify an investigative stop, an officer, under an objective standard, "must be able to point to specific and articulable facts which, taken together with natural inferences from those facts, reasonably warrant that intrusion . . . " *Terry v. Ohio*, 392 U.S. at 20-21. Although "reasonable suspicion can arise from information that is less reliable than required to show probable cause," *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990), a police officer "must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch" '." *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883). In *United States v. Brignoni-Ponce, supra*, the Court stated that the factors that should be taken into account in deciding whether there is reasonable suspicion to stop a vehicle in the border area included (1) the characteristics of the area in which the vehicle is encountered; (2) proximity to the border; (3) usual patterns of traffic on the road; (4) previous experience with alien traffic; (5) information about recent illegal crossings in

the area; (6) behavior of the driver; (7) appearance of the vehicle; and (8) number, appearance or behavior of the passengers. *Id.* at 885, 95 S.Ct. 2582. Courts consider the reasonableness of the officers' suspicion under the "totality of the particular circumstances." *Id.*, at 885 n. 10, 95 S.Ct. at 2582 n. 10.

In the present case, appellant's vehicle was observed leaving a bar traveling at a "slow rate of speed" on Highway 85 during the early evening hours of January 23, 1992. There was no evidence that the vehicle was attempting to circumvent the checkpoint and, in fact, was headed *southbound* where no checkpoints are located. Thus, the theory advanced by the agents, that the two vehicles were in a "lead-vehicle load-vehicle" alien-smuggling pattern is inappropriate. There was no evidence that legitimate traffic on Highway 185 during the early evening hours was unlikely. There were no sensor hits or any indication of recent border crossings. The license plates on the vehicle were not of a foreign state but from New Mexico. And, although the truck was loaded with a lot of personal items, it was not riding low. The fact that the truck was travelling at a slow rate of speed is certainly insufficient to constitute reasonable suspicion. And, when each vehicle was stopped, the occupants produced valid licenses and registrations, did not appear to be nervous or avoid eye contact, and provided reasonable answers to Velasco's questions. Appellant submits that, based upon the factors announced in *United States v. Brignoni-Ponce, supra,* Velasco lacked reasonable suspicion to stop the vehicle driven by appellant. The decision of the United States Court of Appeals for the

Tenth Circuit upholding said stop conflicts with this Court's decisions on the same matter.

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH OTHER DECISIONS OF THAT COURT ON THE SAME MATTER.

In *United States v. Miranda-Enriquez*, 941 F.2d 1081 (10th Cir. 1991), the Court reversed a lower court's finding that a stop initiated by a roving border patrol agent was justified by reasonable suspicion. In *Miranda-Enriquez*, it was established that at approximately 9:00 p.m. on February 15, 1989, a sensor connected to an immigration checkpoint on I-25 near Truth or Consequences, New Mexico, indicated the presence of a vehicle traveling north on Highway 52. Border Patrol Agent Johnston responded and drove to the intersection of Highway 52, I-25, and Highway 85 and parked perpendicular to Highway 52 with his headlights shining into the intersection. Johnston testified that Highway 52 was commonly used by illegal alien smugglers to avoid the checkpoint and that smugglers were most likely to be on the highway in the nighttime hours. Johnston had also made several hundred arrests of smugglers as a result of alerts from the Highway 52 sensor. However, the government did not put on any evidence which would inform the court of how many innocent persons he had stopped during the same period. Shortly after he parked, a 1984 Datsun Sentra traveling north on Highway 52 approached the intersection. As the car came to a stop at the stop sign, it

was illuminated by the headlights of Johnston's car. Johnston noted that the car was heavily covered with fine powdery dust found on vehicles entering Highway 52 from a dirt road near Upham, New Mexico, that was also a well-documented smuggling route. However, Johnston also admitted that the same dust is found in and around Highway 52 and that highway is also extensively traveled by tourists visiting a nearby lake and that the same dust is often seen on their cars. Johnston also saw several undefined shapes in the rear seat of the Datsun which turned out to be child restraint seats. Johnston testified that the driver of the vehicle, Miranda-Enriquez, appeared curiously "frozen" and did not look left or right, i.e., into the headlights of the border patrol vehicle, before turning on to Highway 85. And, Johnston noticed that the vehicle had Arizona license plates. Johnston stopped the vehicle about one mile from the intersection. He testified that he received permission to open the trunk where he discovered marijuana. Miranda-Enriquez denied that he gave consent.

In reversing the conviction, this Court stated:

> "Under the government's view of this case, every out-of-state driver traveling on New Mexico Highway 52 at 9:00 p.m. with a dusty car who does not turn her or his head to look for oncoming cars at the intersection of Highway 52, I-25, and U.S. Highway 85, 98 miles from the Mexican border, can be stopped and questioned by the Border Patrol. We conclude that this proposition cannot be reconciled with the protections of the Fourth Amendment to the Constitution of the United States."

Id. at 1083. The Court held "Johnston's articulated suspicions unreasonable under the Fourth Amendment." *Id.* at 1085.

And, in *United States v. Guillen-Cazares*, 989 F.2d 380 (10th Cir. 1993), it was established that at approximately 10:25 p.m. on December 12, 1991, Border Patrol Agent Joel Nickels, who was operating the checkpoint station on I-25 near Truth or Consequences, New Mexico, observed the headlights of two vehicles travelling north on Highway 181, a paved highway visible from the checkpoint. *Id.*, at 381. Nickels and another agent drove a marked border patrol car to Exit 83 and parked at the stop sign located at the intersection of I-25 and Highway 181 in an effort to intercept the vehicles. *Id.* Nickels noticed that the vehicles were travelling very close together and, as they approached, he turned on his headlights to see the occupants. *Id.* The first car, a red Mercury, contained "quite a few people", and Nickels did not recognize it as a local vehicle. The second vehicle was a white Chrysler with two occupants in the front seat and in Nickels opinion "appeared to be riding a little bit low." *Id.* Nickels pulled onto Highway 181, observed the vehicles enter I-25 south, and finally pulled the Chrysler over when he no longer could see the passenger in the vehicle. *Id.* Sixty pounds of marijuana were discovered in a tire in the trunk of the vehicle. *Id.*

At the suppression hearing, Nickels testified that

> "it is becoming more common for smugglers to use two vehicles in tandem with one of the vehicles acting as a scout or guide vehicle. He also noted border patrol agents have 'run into

> quite a few cases lately where the guide vehicle will actually be behind the other one.'"

Id., at 382. Nickels further stated that when smugglers are operating with two cars, one car usually tries to circumvent the checkpoint and then goes back south to pick up the other car. It was the first time Nickels had watched two cars, presumably riding in tandem, turn south on I-25. *Id.*

The Court reversed the district court's denial of appellant's motion to suppress the evidence discovered in the trunk of the vehicle, holding:

> "The existence of the two cars, proceeding closely together and turning south on I-25, does not evoke the same types of suspicions as other situations and maneuvers found in roving border patrol cases. *See Monsisvais*, 907 F.2d at 991 [*United States v. Monsisvais*, 907 F.2d 987 (10th Cir.1990)]. For instance, in *United States v. Pollack*, 895 F.2d 686 (10th Cir.), *cert. denied*, 498 U.S. 985, 111 S.Ct. 520, 112 L.Ed.2d 532 (1990), we addressed what an agent described as 'the classic alien-smuggling pattern.' A pickup truck came to the Truth or Consequences checkpoint and the driver inquired as to the nearest gas station. When an agent directed the driver south, to Truth or Consequences, the pickup truck headed back south. Approximately forty-five minutes later, agents spotted the same pickup truck travelling north on old Highway 85 (Highway 181), followed closely by a large 1972 Buick with out-of-state license plates. The agent explained 'the purpose of the lead car coming through the checkpoint is to determine if the checkpoint is open and to scout ways around the checkpoint.' *Id.* We concluded this

> pattern, combined with the fact the Buick appeared heavily loaded and was apprehended between 3:00 and 3:45 p.m., gave rise to reasonable suspicion to stop the Buick."

Id., at 383. However, the Court held that based on the facts of the present case, Nickels' suspicions of a tandem smuggling operation **was not** reasonable.

> "Using his analysis, every instance of two vehicles travelling north on Highway 181 during the late evening hours would give rise to suspicion."

Id.

Appellant submits that the decisions of the Tenth Circuit in the two cases cited above conflict with the decision of the Tenth Circuit in the present case, and that this Court should grant *certiorari* to resolve this conflict.

III. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In the recent case of *United States v. Casteneda*, 951 F.2d 44 (5th Cir. 1992), it was established that on November 1, 1989, at 8:15 p.m., Border Patrol Agent Moreno stopped defendant as he was driving south on Welhausen Road near Oilton, Texas, approximately 35 miles from the Mexican border. Welhausen Road is a bumpy, dusty, gravel road that connects Highways 59 and 359. It is used by ranchers and oilfield workers. It is also a well-known

artery for drug trafficking and routing illegal aliens. *Id.* at 45-46.

Moreno had frequently patrolled Welhausen Road during his five years with the Border Patrol, sometimes twice a week. Moreno knew that the road could be used to bypass two United States border checkpoints to avoid detection of illicit alien and drug activities. The Border Patrol had recently been informed that large groups of illegal aliens were being smuggled into the country over the Welhausen Road route. The agency had also made at least four cocaine or marijuana related arrests along this road during the preceding three months. Moreno also indicated that narcotics had been discovered on nearly every road in this rural, south Texas area. Trafficking in people and drugs seems to be a fact of life there. *Id.* at 46, and n. 2.

The day before defendant's arrest, Moreno had received an intelligence report that a group of illegal aliens would be dropped off on Welhausen Road at 8:00 p.m. He waited in the area that night, but no one came. He returned the following evening, on November 1, 1989, and at about 8:15 p.m., observed defendant's welding truck turn on to the Welhausen Road. He decided to follow the truck because it could have been a "lead" or "scout" vehicle for a larger group of illegal aliens to follow. *Id.*

Moreno, with his driver's side window rolled down, followed defendant's truck for about a mile. Moreno testified that he could detect the faint odor of marijuana while following behind, and decided to stop the truck. A

subsequent search revealed 257 pounds of marijuana hidden in the truck. *Id.*

In affirming the district court's denial of defendant's motion to suppress, the United States Court of Appeals for the Fifth Circuit first stated the issue presented: "whether, when agent Moreno stopped the truck, he had a reasonable suspicion that Casteneda was engaged in criminal activity." *Id.* The Court went on to state:

> "The propriety of agent Moreno's stop of Casteneda's truck centers on the agent's testimony that he could detect the faint odor of marijuana trailing the truck as he followed with his window open. It is this fact alone which animates a finding of reasonable suspicion; without it, the other *Brignoni-Ponce* factors are suspicion-neutral in this setting. Accepting as true all of the district court's other findings under *Brignoni-Ponce*, agent Moreno could not, as a matter of law, have had a reasonable suspicion that Casteneda was engaged in criminal activity without the added fact that he smelled marijuana while trailing the vehicle. *We must take care not to open Welhausen Road, or any other, to the whimsy of every agent who sees a vehicle using the roadway.* Without the smell, nothing was unusual about Casteneda being on Welhausen Road." (Emphasis added).

Id. at 47. In a footnote, the Court further stated:

> "At the point when agent Moreno began following Casteneda's truck, and before he smelled the marijuana, Moreno had no better reason to surmise that Casteneda was engaged in criminal activity than he did to suspect the driver of any other vehicle on the road that

> night. To say that at this point the agent had a reasonable suspicion, sufficient to justify a roving border patrol investigatory stop, would be to say that he could have stopped any vehicle on the road simply because smuggling was common on the road, because the road was fairly close to the Mexican border, and because the road happened to bypass two U.S. border checkpoints. Indeed, were we to accept this view of reasonable suspicion, nothing would prevent law enforcement agents from stopping any vehicle, on any back road in the Texas-Mexico border area; the roads all share the essential characteristics of Welhausen Road."

Id. at 47 n. 4.

Again, appellant submits that the decision of the Tenth Circuit in the present case is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Casteneda,* and that this Court should grant *certiorari* to resolve this conflict.

IV. PETITIONER WAS DENIED HIS RIGHT UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO REMAIN SILENT WHEN THE DISTRICT COURT REFUSED TO SEVER COUNTS ONE AND TWO OF THE INDICTMENT.

V. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Prior to trial, Petitioner moved for a severance of Counts under Rule 14, Fed.R.Crim.Proc., and informed

the Court that he wished to testify as to the gun count, Count II of the indictment, but not as to the substantive drug count, Count I. The court denied the motion. Thus, Petitioner was forced to either testify **as to both counts** or to remain silent and not testify as to either. *Martin II*, at p. 1517-18. Petitioner testified telling the jury that:

> " . . . the gun in question was not his gun that it was his father's gun and that he was not intending to use it in any way in a drug trafficking offense. And it did not play a role, nor was it an integral part of a drug transaction."

Id., at 1518. Both the codefendant and the government were allowed to cross-examine Petitioner as to Count I, convicting himself as to this Count in an attempt to win an acquittal as to Count II. *Id.*

In affirming Petitioner's convictions, the Tenth Circuit held that Petitioner "did not make a convincing showing that he had important testimony to give concerning Count II . . . . " *Id.*, at 1519.

> "[T]he evidence was convincing that Martin was the sole occupant of the vehicle containing the 495 pounds of marijuana charged in Count I and the user of the semi-automatic Colt pistol charged in Count II.
>
> * * *
>
> "Martin's 'important testimony' . . . necessarily would have had to relate to proof that the weapon was not clearly accessible, not an integral part of the undertaking, and that it did not increase the likelihood of success of the criminal undertaking."

Id. Finding that Petitioner failed to establish any one of the above, the Court affirmed.

However, the same court has stated:

> "Mere access to a firearm is insufficient to sustain a conviction under 18 U.S.C. § 924(c)(1). Rather, the evidence must prove that the defendant intended the weapon to be available for use during the drug transaction."

United States v. Conner, 972 F.2d 1172, 1173 (10th Cir. 1992). Clearly, appellant's testimony **was** "important" to establish that he lacked the intent needed to sustain a conviction under 924(c).

Recently this Court, in discussing a severance of defendants under Rule 14, held that:

> " . . . a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants. . . . "

Zafiro v. United States, ___ U.S. ___, ___, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993).

Appellant submits that the same standard should apply when a severance of counts is requested. Appellant had an absolute right to remain silent as to Count I of the indictment, but wished to testify as to Count II. The only way that the district court could prevent a "compromise of [this] specific trial right" was to grant a severance of counts.

CONCLUSION

For the forgoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinions below.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

David Joe MARTIN, Defendant-Appellant.

No. 92-2240.

United States Court of Appeals,
Tenth Circuit.

Jan. 10, 1994.

Order Granting Rehearing Feb. 10, 1994.

Defendant was convicted of possession with intent to distribute more than 100 kilograms of marijuana and carrying and using firearm during and in relation to drug trafficking offense, by the United States District Court for the District of New Mexico, Howard C. Bratton, J. Defendant appealed. The Court of Appeals, Barrett, Senior Circuit Judge, held that: (1) border patrol had reasonable suspicion to stop defendant; (2) Court of Appeals had no basis from which to determine whether district court's denial of defendant's motion for severance of counts gave rise to abuse of discretion; and (3) Court of Appeals could not determine whether district court's failure to give defendant's requested instruction was error.

Affirmed.

On Rehearing in Part 18 F.3d 1515.

Joseph (Sib) Abraham, Jr., El Paso. TX, for defendant-appellant.

David N. Williams (Larry Gomez, U.S. Atty., and Judy A. Patton, Asst. U.S. Atty., on the brief), Las Cruces, NM, for plaintiff-appellee.

Before KELLY, GODBOLD*, and BARRETT, Circuit Judges.

BARRETT, Senior Circuit Judge.

David Joe Martin (Martin) appeals from the judgment and sentence entered following a jury trial and his conviction of possession with intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 18 U.S.C. § 2, charged in Count I, and carrying and using a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c), charged in Count II. Martin was sentenced to sixty (60) months imprisonment followed by four years of supervised release on Count I and sixty (60) months imprisonment followed by three years of supervised release on Count II, the imprisonment terms to be served consecutively and the supervised release terms to be served concurrently.

Prior to trial, Martin and co-defendant Robert George Wood moved to suppress physical evidence and statements. Following a hearing, the motions were denied by the district court via detailed findings of fact and conclusions of law. Martin failed to include a transcript of the suppression hearing as part of his appendix on appeal. *See* Fed.R.App.P. 30(a); 10th Cir.R. 30.1.1 referencing 10th

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* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Cir.R. 10.3 and in particular 10.3.2(d). While we have discretion to supplement the record before us, *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 728 n. 10 (10th Cir.1993); *United States v. Tranakos*, 911 F.2d 1422, 1426 n. 3 (10th Cir.1990), we decline to do so. *See United States v. Vasquez*, 985 F.2d 491, 494-95 (10th Cir.1993). Martin has not challenged the findings of fact by the district court. Accordingly, we rely on and adopt the district court's findings of fact:

Findings of Fact

1. The United States Border Patrol operates three permanent checkpoints in southern New Mexico; the I-25 checkpoint north of Las Cruces, the Highway 185 checkpoint north of Las Cruces, and the I-10 checkpoint west of Las Cruces, New Mexico. United States Border Patrol agents are assigned to work at each of the checkpoints on a rotating basis. All checkpoints are not open for operation at the same time or on a twenty-four-hour basis but are open as manpower permits.

2. As part of routine checkpoint procedures, agents patrol roads in the vicinity of the checkpoint to which they are assigned. The purpose of this roving patrol is to look for undocumented aliens walking around the checkpoint and for suspicious vehicles.

3. New Mexico Highway 185 is a well-documented smuggling route for aliens and narcotics.

4. New Mexico Highway 185 is situated roughly parallel to I-25 on the western side of

the interstate. Highway 185 proceeds from the border area north through rural New Mexico. The road is a two-lane highway that circumvents the checkpoint on I-25. The checkpoint on Highway 185 is located immediately off the roadway. A motorist traveling on Highway 185 would know whether the checkpoint is open or closed by the absence or presence of vehicles, cone markers, and personnel.

5. There are few businesses on Highway 185 around the area of the checkpoint. South of the checkpoint, there is the Blue Moon Bar, and there is a Mercantile store several miles south of the Bar. The road is used by many farmers and agricultural workers.

6. On January 23, 1992, at approximately 5:05 p.m., the defendant Robert Wood drove a 1991 Dodge pickup truck into the checkpoint on I-25. Mr. Wood was alone in the vehicle.

7. Agent Miguel Estrada motioned for Mr. Wood to stop before the place vehicles normally stop to allow another agent to cross the roadway. Mr. Wood failed to stop where Agent Estrada indicated, but he did stop at the stop sign where vehicles are normally required to stop.

8. Mr. Wood appeared to be in a hurry. After Agent Estrada verified that Mr. Wood was a United States citizen, he asked Mr. Wood where he was coming from. Mr. Wood responded that he was coming from Anthony and then volunteered that he was going to Hatch to look for hay. Agent Estrada then permitted Mr. Wood to leave the checkpoint. It is unusual for persons questioned at the checkpoint to volunteer information.

9. Agent Francisco Velasco was also on duty at the I-25 checkpoint at the time Mr. Wood entered and left the checkpoint. Just after Mr. Wood left, Agent V4elasco also left the checkpoint and proceeded southbound to assist an officer on I-25 south of the checkpoint. Before he arrived to help the officer, he learned by radio he was no longer needed. He then decided to patrol Highway 186. Agent Velasco proceeded west on Highway 157, and north on Highway 185 toward the checkpoint, which was not opened that date. Agent Velasco was in a marked United States Border Patrol vehicle and was in uniform. At approximately milemarker 17, south of the Highway 185 checkpoint, the agent passed Mr. Wood's vehicle at milemarker 17, traveling southbound at an excessive rate of speed, at least 75 miles per hour.

10. Mr. Wood's vehicle would have had to pass the checkpoint on Highway 185 in order to get from the I-25 checkpoint to where Agent Velasco saw him.

11. Agent Velasco recognized Mr. Wood's vehicle from the I-25 checkpoint and radioed to Agent Estrada at the I-25 checkpoint.

12. There was not enough time for Mr. Wood to have travelled from the I-25 checkpoint to Hatch and back to the point on Highway 185 where Agent Velasco saw him even though he was travelling at a high rate of speed.

13. Agent Estrada advised Agent Velasco that the driver had claimed he was going to Hatch to look at hay. He also advised Agent Velasco there was no way the driver could have gone to Hatch in that amount of time. Agents Velasco and Estrada believed the vehicle was a

scout vehicle for a load of undocumented aliens or narcotics. The function of the scout vehicle is to view the checkpoints to see if they are open, determine if a trained dog is on duty, and to determine whether roving patrol is operating in the area. The scout vehicle communicates with the load vehicle before the load vehicle travels north to the checkpoints.

14. Agent Velasco made a u-turn on Highway 185, and proceeded southbound. When he arrived at the Blue Moon Bar, he observed Mr. Wood's vehicle parked in the parking lot. He looked in the parking lot for a vehicle which could be the "load" vehicle connected to the suspected scout vehicle. Agent Velasco observed that there were five cars and one pickup truck in addition to Mr. Wood's vehicle. The pickup truck was a Chevrolet with a camper shell. Agent Velasco noticed that the Chevrolet had been packed so that miscellaneous goods were stacked at the rear of the bed, with room in the bed of the truck which could be used to conceal undocumented aliens or narcotics. This method of packing was consistent with the appearance of pickup trucks from which Agent Velasco has apprehended narcotics or undocumented aliens. This method of packing is also consistent with innocent behavior. Agent Velasco also noticed that both of the pickup trucks in the parking lot had CB antennae, which indicated to him that the occupants could communicate with one another. No other vehicle in the parking lot appeared to Agent Velasco to be a possible load vehicle.

15. Agent Velasco passed the Blue Moon Bar and traveled south. He then made another

u-turn and returned northbound on Highway 185 to the Bar. As he approached, he saw Mr. Wood's vehicle about to exit the parking lot in a southerly direction. The Chevrolet was also moving, following Mr. Wood's truck. Mr. Wood did not leave the parking lot until Agent Velasco passed him. The driver of the Chevrolet jerked the truck to a stop.

16. Agent Velasco passed the Bar and proceeded north toward the Highway 185 checkpoint. The trucks proceeded southbound. Agent Velasco made another u-turn and watched the trucks. He observed the trucks creeping southbound along Highway 185, traveling approximately 5-10 miles per hour. Mr. Wood's vehicle was first, the Chevrolet followed.

17. As Agent Velasco pulled closer to the vehicles, Mr. Wood accelerated and pulled away from the suspected load vehicle. Agent Velasco believed Mr. Wood was attempting to act as a decoy, to lure the agent away from the load vehicle. Agent Velasco had previously encountered this phenomenon of the decoy. Agent Velasco radioed the I-25 checkpoint for backup assistance.

18. Agent Velasco pulled around the Chevrolet to pursue Mr. Wood's vehicle. As he passed the Chevrolet, he could see into the vehicle. He observed a covering over the bed of the truck, where the goods were not packed. Agent Velasco believed either aliens or narcotics could be concealed in the area in the Chevrolet, but the truck did not appear to be riding low. The back of the truck appeared loaded with personal gear, riding gear, and ropes. The agent passed the Chevrolet and pursued the lead vehicle.

Agent Velasco activate [sic] his emergency lights and stopped Mr. Wood at the Leasburg Mercantile store. He quickly determined the identity of the driver, Robert Wood. Mr. Wood was extremely animated at roadside. He yelled at the agent, and was generally upset at having been stopped. Agent Velasco advised Mr. Wood he believed he was the scout vehicle for a load of aliens or narcotics, and that he should stay at that location. Mr. Wood's demeanor changed dramatically; he became quiet. Agent Velasco believed this to be nervous or guilty behavior. Agent Velasco took Mr. Wood's driver's license and registration, and returned north to retrieve the suspected load vehicle. As the agent left the area of the stop, he observed Mr. Wood throw his hands down as if in disgust, then crossed his arms and leaned against his truck.

19. Mr. Wood was not free to leave the area.

20. Within minutes, Agent Velasco located the Chevrolet still slowly traveling southbound. He turned around and activated his emergency lights. The driver did not respond until he pulled into the Mercantile store area where Mr. Wood was already waiting. Mr. Wood had waited approximately three minutes at roadside before Agent Velasco returned with Mr. Martin's vehicle.

21. Agent Velasco parked his patrol car in front of Mr. Martin's vehicle so that Mr. Martin where would not attempt to flee. The agent went up to the window of Mr. Martin's vehicle and identified himself. He asked Mr. Martin where he was coming from, and Mr. Martin replied he had come up from Anthony to drink

a beer. When asked if he lived in Anthony, Mr. Martin replied he did not live there but had been there for a roping contest.

22. Agent Velasco asked each man out of the presence of the other if he knew the other man. Both men replied in the negative. Then the agent had the men look at each other, and he asked them again in [sic] they knew each other. The men answered, "No," but they appeared to be avoiding eye contact. They appeared nervous to the agent.

23. Agent Velasco advised both subjects he believed Mr. Martin was transporting aliens or narcotics under the bed in the back of his truck and that Mr. Wood was Mr. Martin's scout vehicle.

24. Agent Velasco asked for permission to search the trucks. Mr. Wood readily consented. Mr. Martin stated the agent could search the cab, but not the bed, because that was where he lived. Agent Velasco stated he would call for a canine to conduct an inspection of the exterior of Mr. Martin's truck. The length of the detention from the first stop until this point was approximately four minutes. Mr. Martin was not free to leave the area.

25. Agent Estrada arrived at the scene at about 6:00 p.m., approximately ten to fifteen minutes later. The canine and his handler, Agent Thatcher, arrived approximately six minutes after that.

26. The canine inspected Mr. Martin's vehicle, and within thirty seconds the canine alerted. The alert indicated to Agent Thatcher

> that either contraband or humans were concealed. The agents informed Mr. Wood and Mr. Martin that the dog had alerted. The agents then opened the back of Mr. Martin's camper shell and smelled marijuana. Agent Velasco retrieved a package of marijuana from the vehicle, and the agents placed both men under arrest. Agent Estrada advised both men and their rights under the *Miranda* decision.
>
> 27. The canine also inspected Mr. Wood's vehicle and alerted to the front area of the cab. The agents then searched the cab and found no aliens or contraband. The alert indicated there had once been drugs in the cab.
>
> 28. The defendants were each detained at roadside approximately thirty minutes prior to the canine alert.

(Appellant's Appendix, Tab 3 at 1-9).

A search of Martin's pickup revealed approximately 495 pounds of marijuana concealed therein.

Martin proceeded to trial, during which the district court denied his motion to sever Counts I and II, and his proffered instruction on his defense theory that "mere transportation of a firearm is no[t] within the purview of § 924(c)(1)." (Appellant's Opening Brief at 20).

On appeal, Martin contends that: (1) the discovery of the marijuana was the result of an illegal search and seizure; (2) the district court erred in failing to grant a severance of counts; and (3) the district court erred in failing to give his requested jury instruction.

I.

Martin contends that the discover of marijuana was the result of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution.

Martin acknowledges that we must accept the district court's findings of fact unless clearly erroneous, *United States v. Barbee*, 968 F.2d 1026, 1028 (10th Cir.1992), and that "[t]he ultimate determination of reasonableness under the fourth amendment is . . . a conclusion of law we review de novo." *United v. Venzor-Castillo*, 991 F.2d 634, 636 (10th Cir.1993). On appeal, we view the evidence in the light most favorable to the district court's ruling. *United States v. Soto*, 988 F.2d 1548, 1551 (10th Cir.1993).

The parties agree that the proper standard for determining whether a border patrol officer has reasonable suspicion to stop a vehicle was set forth in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582, 45 L.Ed.2d 607 (1975). There, the Court opined that "[e]xpect at the border and its functional equivalents, officers on roving patrols may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." The parties further agree that the factors which should be taken into account under *Brignoni-Ponce* include: the characteristics of the area in which the vehicle is stopped; patterns of traffic on the road; proximity to the border; previous experience with alien traffic in the area; information about recent border crossing; attempts to evade detection; appearance of the vehicle; appearance

and behavior of the driver and passengers; and other relevant information.

The parties disagree, however, as to whether the border patrol agents in our case had reasonable suspicion, based on "specific articulable facts, together with rational inferences from those facts," to stop Martin.

Martin argues that *United States v. Guillen-Cazares*, 989 F.2d 380 (10th Cir.1993), *United States v. Casteneda*, 951 F.2d 44 (5th Cir.1992), *United States v. Miranda-Enriquez*, 941 F.2d 1081 (10th Cir.1991), *United States v. Monsisvais*, 907 F.2d 987 (10th Cir.1990), *United States v. Pollack*, 895 F.2d 686 (10th Cir.1990), *cert. denied*, 498 U.S. 985, 111 S.Ct. 520, 112 L.Ed.2d 532 (1990), and *United States v. Abdom-Limas*, 780 F.Supp. 773 (D.N.M.1991), "each give ample support that Velasco lacked reasonable suspicion for the detention of his vehicle." (Appellant's Opening Brief at 17). The government responds that "the facts of this case remove it from the control of the cases [relied upon by Martin] where the Court has found no reasonable suspicion to stop the vehicles," (Brief of Appellee at 21), and "place it within the control of *Pollack*, and *United States v. Barbee*, 968 F.2d 1026 (10th Cir.1992), where the records were substantial and the agents explained their actions." *Id.* We shall consider each of these cases in turn.

In *Pollack*, experienced Border Patrol Agents had observed a pickup "originally [go] through the checkpoint, [find] a reason to return to Truth or Consequence, and thereafter . . . come back north through the smuggling route, followed by Pollack, circumventing the checkpoint in a classic alien smuggling pattern." 895 F.2d at 690. In that case, we held that the agents, armed with

such knowledge, and having observed Pollack driving a large vehicle capable of hauling a large number of people following the pickup between 3:00 and 3:45 a.m. on a well-documented alien smuggling route during a time when traffic was very unlikely on Highway 85 and at an hour when a very, very small percentage of the traffic stopped on Highway 85 was legitimate, had reasonable suspicion to stop him.

In *Monsisvais*, "we fashion[ed] the reasonable-suspicion question . . . as . . . [w]hether the Border Patrol Agents operating the Truth or Consequences checkpoint may stop every heavily loaded pickup truck bearing a camper shell and out-of-state license plates that travels northbound on this stretch of Highway 85 at 7:30 p.m." 907 F.2d at 990. In holding that agents could not, we observed that the record on appeal was "barren of information describing the origins of Highway 85 in this area and thus fails to instruct us as to the types of legitimate traffic that might be expected to make use of the road at this time of day," *id.*, and "[i]n short, the record does not provide us a basis for concluding that a vehicle's presence on Highway 86 at 7:30 p.m. is at all unusual, much less that it is suggestive of criminal conduct." *Id.* at 990-91. We distinguished *Pollack*, noting:

> Appellee argues that "the truck . . . turned south rather than North on [I-25] after spotting the border patrol. This action was considered evasive by the border patrolman." However, appellant's driving behavior simply does not elicit the same types of logical inferences and suspicions as do other "evasive" maneuvers encountered by this court in similar cases. For example in *Pollack*, the appellant's vehicle first

> approached the Truth or Consequences checkpoint, and turned back south on Interstate 25 after asking for directions to the nearest gas station. After responding to two sensor alerts on northbound Highway 85, agents then discovered appellant's vehicle leading a second vehicle that later was found to be carrying contraband. Based on the record before it, the *Pollack* court referred to the use of a "scout" car in this fashion as "a classic alien smuggling pattern."

907 F.2d at 991.

In *Miranda-Enriquez*, we interpreted the government's view to be that "every out-of-state driver traveling on New Mexico Highway at 9:00 p.m. with a dusty car who does not turn her or his head to look for oncoming cars at the intersection of Highway 52, I-25, and U.S. Highway 85, 98 miles from the Mexican border, can be stopped and questioned by the Border Patrol." 941 F.2d at 1083. In that case, we followed *Monsisvais* in holding that we could not, based on the record before us, hold that the "facts and the rational inferences flowing from them . . . amount[ed] to a basis for a reasonable suspicion to stop [the defendant] for questioning. . . . " 941 F.2d at 1084. Significant to our holding was the arresting agent's testimony that he did not know what the likelihood of smugglers traveling on the road at 9:00 p.m. would be, and evidence which "show[ed] that the route upon which Mr. Miranda-Enriquez traveled was legitimately used by tourists departing from the nearby lake." *Id.*

In *Castenda*, the court held that a roving Border Patrol agent, having detected the faint odor of marijuana emanating from the defendant's truck while following the

truck in his patrol car, had reasonable suspicion to stop the truck. The court observed that its "decision today is driven by a limited record," 951 F.2d at 48, and cautioned that:

> . . . before he [Agent Moreno] smelled the marijuana, Moreno had no better reason to surmise that Castenada was engaged in criminal activity that he did to suspect the driver of any other vehicle on the road that night. To say that at this point [before he smelled the marijuana] the agent had a reasonable suspicion, sufficient to justify a roving border patrol investigatory stop, would be to say that he could have stopped any vehicle on that road simply because smuggling was common on the road, because the road was fairly close to the Mexican border, and because the road happened to bypass two U.S. border checkpoints.

951 F.2d at 47 n. 4.

In *Abdon-Limas*, the district court, after reviewing our decisions in *Pollack*, *Monsisvais*, and *Miranda-Enriquez*, concluded in granting the defendant's motion to suppress:

> . . . given the Truth Circuit case law and the totality of the circumstances in this case, I am precluded from concluding that every out-of-state vehicle traveling north on 185 at mid-day which dramatically slows down when approached by a border patrol vehicle and which contains occupants who appear to consciously avoid looking at the border patrol vehicle, can be stopped and questioned by the border patrol.

780 F.Supp. at 780.

In *Guillen-Cazares*, after noting the factual distinctions in that case and *Pollack*, we held:

> Viewing the totality of the circumstances, we are left to consider the fact the defendant was traveling at night on a known smuggling road, with one passenger, in a vehicle which slanted to the rear and was following a car with several passengers. These articulated facts, and the fact the passenger slouched down at some point after the car entered I-25 south, together with the rational inferences from the facts, do not reasonably warrant suspicion the defendant's vehicle was smuggling aliens or narcotics.

989 F.2d 384.

In *Barbee*, we held that Border Patrol agents had reasonable suspicion to stop defendants' vehicle based on the following facts:

> . . . the vehicle was traveling northbound on a highway known to be commonly used by alien and drug smugglers because its [sic] avoids the Truth or Consequences border checkpoint; the vehicle had out-of-state, Texas license plates; it was traveling in the evening, after dark; the time of the year was February, a month when typically little traffic travels that road; there were several occupants in the car; and when the agent's headlights lit up the car the passengers in the back seat crouched down. We conclude that these factors support a finding of reasonable suspicion to stop the vehicle. *See Pollack*. . . .

968 F.2d at 1029.

Also in *Barbee*, after observing that "[o]ur holding is not in conflict with . . . *Monsisvais* . . . [which] emphasized

the inadequacy of the evidence in the record," id., we observed:

> The record in the instant case could have been stronger but is not as incomplete as *Monsisvais*. The record contains testimony and the qualifications of two different agents with experience in the area. They explained the location of the road, the typical nature of the traffic at that time of year and that time of day of old Highway 52, and their experience with alien and drug smugglers. Also important is that the agent making the stop observed the passenger sinking down in an apparent effort to avoid detection; such behavior is suspicious conduct not clearly susceptible to unsuspicious interpretations, unlike passengers merely avoiding eye contact, turning their heads away from a light, or shielding their eyes.
>
> On the record before us, considering the passengers' conduct, the usual traffic patterns and the characteristics of old Highway 52, the investigative stop was proper.

968 F.2d at 1029-30 (Citations omitted).

Considering these cases in the aggregate, it is clear that: border patrol stop cases are fact driven and must be considered on a case-to-case basis; reasonable suspicion to stop will not be imputed from a barren record; and, in the absence of a well developed record, law enforcement officials cannot infer criminal conduct from otherwise innocent travel.

The concept of reasonable suspicion is not subject to uniform definition. In *United States v. Sokolow*, 490 U.S. 1,

7-8, 109 S.Ct. 1581, 1585-86, 104 L.Ed.2d 1 (1989), the Court opined:

> The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.' . . . In evaluating the validity of a stop such as this, we must consider the 'totality of the circumstances – the whole picture.' *United States v. Cortez*, 449 U.S. 411, 417 [101 S.Ct. 690, 695, 66 L.Ed.2d 621] (1981). As we said in *Cortez*:
>
> > The process does not deal with hard certainties. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact-finders are permitted to do the same – and so are law enforcement officers. Id. at 418, 101 S.Ct. at 695.

In considering the "whole picture" in our case, which is unlike *Monsisvais* and *Miranda-Enriquez* where we were faced with barren or limited records, we are fortunate to have the district court's extensive and unchallenged findings of fact detailing the circumstances involving the Martin stop: agents routinely patrol roads in the vicinity of check points, looking for suspicious vehicles; Highway 185 in a well-documented smuggling route for aliens and narcotics, situated roughly parallel to I-25 circumventing the I-25 checkpoint; Highway 185 has a checkpoint located immediately off the road; there are few businesses on Highway 185 around the area of the checkpoint and the road is used by many farmers and agricultural workers; when co-defendant Wood went through the I-25

checkpoint, he appeared to be in a hurry; Wood volunteered to Agent Estrada that he was going to Hatch to look for hay; it is unusual for people to volunteer information at a checkpoint; Agent Veslasco was also on duty at the checkpoint when Wood entered and left; after Wood left, Agent Velasco began patrolling Highway 185; while patrolling Highway 185, Agent Velasco observed Wood traveling southbound on that highway at an excessive speed, at least 75 miles per hour; Agent Velasco, recognizing Wood's vehicle from the I-25 checkpoint, radioed Agent Estrada; Agent Estrada advised Agent Velasco that the driver of the vehicle had related that he was going to Hatch to look for hay but that there was no way the driver could have driven to Hatch and back in that short period of time; the agents believed that Wood was a scout vehicle for a load vehicle carrying undocumented aliens or narcotics; the function of the scout vehicle is to view the checkpoints to see if they are open, determine if a roving patrol is operating in the area, and to communicate with the load vehicle before the load vehicle travels north to the checkpoint; Agent Velasco, northbound on Highway 185 when he observed Wood traveling southbound at an excessive rate of speed, made a u-turn, proceeded southbound and observed Wood's vehicle in the Blue Moon Bar parking lot; Agent Velasco observed the six vehicles in the parking lot and looked for a vehicle which could be a load vehicle for the suspected scout vehicle; Agent Velasco observed that one of the vehicles, a pickup with a camper shell, had CB antennae as did Wood's pickup, indicating to Velasco that the occupants of the two vehicles could communicate with each other; the pickup was packed in a manner consistent

with the appearance of pickup trucks from which Agent Velasco had apprehended narcotics or undocumented aliens, but this method of packing was also consistent with innocent behavior; Agent Velasco observed Wood's vehicle leave the parking lot with the second pickup following it; the vehicles were creeping southbound at 5-10 miles per hour; when Agent Velasco pulled up closer to the vehicles, Wood accelerated his vehicle and pulled away from the suspected load vehicle, indicating to Agent Velasco that Wood was acting as a decoy to lure him away from the load vehicle; Agent Velasco had previously encountered the phenomenon of the decoy; when Agent Velasco stopped Wood, Wood was yelling and generally upset for being stopped but he quieted down when Agent Velasco indicated that he believed Wood was acting as a scout vehicle; Agent Velasco believed Wood's mood changed to nervous or guilty behavior; when Agent Velasco left Wood and drove north to retrieve the suspected load vehicle, he observed Wood throw his hands down as if in disgust and then cross his arms and lean against his truck; shortly thereafter when Agent Velasco located the pickup being driven by Martin, it was still slowly traveling southbound on Highway 185; Agent Velasco stopped Martin when he [Martin] pulled into the store parking lot where Wood was waiting.

Mindful that the concept of reasonable suspicion cannot be reduced to a "neat set of legal rules," *Sokolow*, and that law enforcement officers, like jurors, are permitted to formulate "certain common sense conclusions about human behavior," *Cortez*, we hold, based upon "the whole picture," *Sokolow*, that the Border Patrol agents had reasonable suspicion to stop Martin.

II.

Martin contends that the district court erred in denying his motion for a severance of counts. As set forth *supra,* Martin was charged in Count I with possession with intent to distribute more than 100 kilograms of marijuana and in Count II with carrying and using a firearm in relation to a drug trafficking offense.

Martin's motion was based on his desire not to testify as to Count I, the substantive drug count, but his desire to testify as to Count II, the gun count. The court denied his motion via a minute order. Martin argues that the court's denial "forced [him] to testify at trial and convict himself as to the drug count in an attempt to win an acquittal of the gun count." (Appellant's Opening Brief at 18). Martin contends that inasmuch as he "had both important testimony to give concerning one count and a strong need to refrain from testifying on the other," *id.* at 18-19, the district court's refusal to sever the counts deprived him of a fair trial.

The government responds, citing *United States v. Parra,* 2 F.3d 1058, 1062 (10th Cir.), *cert. denied,* ___ U.S. ___, 114 S.Ct. 639, 126 L.Ed.2d 597 (1993), that a decision to grant or deny a severance will not be disturbed on appeal absent an affirmative showing of an abuse of discretion and that the burden on the defendant in this context is a difficult one. The government argues that inasmuch as the evidence and theories of the two counts were interconnected, the district court did not abuse its discretion in denying Martin's motion to sever Counts I and II.

An appellant is responsible for insuring that all materials on which he seeks to rely are part of the record on appeal. *United States v. Vasquez*, 985 F.2d 491, 495 (10th Cir.1993). When an appellant asserts that his conviction should be reversed because of a particular error but the record does not permit us to evaluate the claim, we will generally refuse to consider it. *Id.* Here, the record on appeal does not include the trial transcript. Under these circumstances, we have no basis from which to determine whether the district court's denial of Martin's motion for a severance of counts gave rise to an abuse of discretion. *See United States v. Rascom*, 922 F.2d 584, 588 (10th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2037, 114 L.Ed.2d 121 (1991) (where issue of the legality of appellant's detention by the Border Patrol was raised during trial, failure by the appellant to designate the trial transcript precludes review).

III.

Martin contends that the district court erred in refusing to give his requested instruction on § 924(c).

Martin argues that his theory of defense was clear: he admitted his guilt as to the substantive drug charge contained in Count I but denied that the weapon found in the vehicle was carried and used during said drug trafficking crime. Accordingly, Martin argues that he was entitled to an instruction on his theory that "mere transportation of a firearm is not within the purview of § 924(c)(1)." (Appellant's Opening Brief at 20). Martin contends that inasmuch as "the other instructions given by the Court as a whole did not sufficiently cover the

issues in the case and focus on the facts presented by the evidence," that "a new trial should be granted." *Id.*

We "examine jury instructions as a whole to determine whether the jury was provided with an accurate statement of the applicable law." *United States v. Self*, 2 F.3d 1071, 1089 (10th Cir.1993), citing, *United States v. Harmon*, 996 F.2d 256, 257 (10th Cir.1993) (citations omitted). We will reverse a conviction due to an erroneous instruction only if the error was prejudicial when viewed in light of the entire record. *United States v. Caro*, 965 F.2d 1548, 1555 (10th Cir.1992).

Although Martin contends that the court erred in refusing to give his proffered instruction on § 924(c), he has failed to include the jury instructions in the record on appeal. Under such circumstances, we cannot consider whether the court's failure to give his proffered instruction gave rise to error. *Vasquez*, 985 F.2d at 494 ("When the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, the Court of Appeals is unable to rule on that issue."); *Southwest Forest Industries, Inc. v. Sutton*, 868 F.2d 352, 356 (10th Cir.1989), *cert. denied*, 494 U.S. 1017, 110 S.Ct. 1320, 108 L.Ed.2d 496 (1990) (failure to designate the instructions as part of the record on appeal renders it impossible to review appellant's contention that the trial court failed to properly instruct the jury).

AFFIRMED.

ORDER

Filed February 10, 1994

Appellant's petition for rehearing is granted as to two contentions of error raised on appeal but not addressed in our opinion for want of a trial transcript or jury instruction: (1) the district court erred in failing to grant a severance of counts, and (2) the district court erred in failing to give a proffered instruction on 18 U.S.C. § 924(c). We deny appellant's petition for rehearing on appellant's contention that the district court erred in denying his motions to suppress, having reached the merits on that issue.

Within ten days of the date of this order, appellant shall transmit those portions of the district court's record appellant deems necessary for our review of the above contentions (1) and (2) to our Clerk's office.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

David Joe MARTIN, Defendant-Appellant.

No. 92-2240.

United States Court of Appeals,
Tenth Circuit.

April 4, 1994.

Defendant was convicted in the United States District Court for the District of New Mexico, Howard C. Bratton, J., of possession with intent to distribute more than 100 kilograms of marijuana and carrying and using firearm during and in relation to drug trafficking offense. Defendant appealed. The Court of Appeals, 15 F.3d 943, affirmed. On rehearing, the Court of Appeals, Barrett, Senior Circuit Judge, held that: (1) defendant failed to establish need for severance of counts, and (2) instruction as to weapon offense provided jury with accurate statement of law, and district court's refusal to define "carrying" was not reversible error.

Affirmed.

Joseph (Sib) Abraham, Jr., El Paso, TX, for appellant.

David N. Williams (Larry Gomez, U.S. Atty., and Judy A. Patton, Asst. U.S. Atty., on the brief), Las Cruces, NM, for appellee.

Before KELLY, Circuit Judge,
BARRETT, Senior Circuit Judge,
GODBOLD*, Senior Circuit Judge.

OPINION ON REHEARING

BARRETT, Senior Circuit Judge.

In *United States v. Martin*, 15 F.3d 943 (1994 WL 38670 (10th Cir. (1994)). (*Martin I*), we affirmed the judgment and sentence entered following a jury trial and Martin's conviction of possession with intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 18 U.S.C. § 2, and carrying and using a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). We rejected Martin's contention that the discovery of the marijuana was the result of an illegal search and seizure in violation of the Fourth Amendment. We declined to consider, based on an insufficient record on appeal, Martin's contentions that the district court erred in failing to grant a severance of counts and in failing to give his requested jury instruction on § 924(c)(1).

Martin filed a petition for rehearing wherein he requested that we reconsider his contentions that the district court erred in failing to find that: the discovery of the marijuana was the result of an illegal search and seizure, the counts should have been severed, and his proffered instruction on § 924(c)(1) should have been

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* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

given. Martin represented that he was confused and uncertain with respect to this court's requirements of an appropriate record on appeal.

Thereafter, upon finding of just and reasonable cause, we entered an Order in which we: granted Martin's request that we reconsider the two contentions of error raised on appeal but not addressed in *Martin I*, i.e., whether the district court erred in failing to grant a severance of counts and in failing to give his proffered instruction on § 924(c)(1); denied Martin's request that we reconsider his contention that the discovery of the marijuana was the result of an illegal search and seizure, having reached the merits on that issue in *Martin I*; and directed that Martin transmit those portions of the district court's record which he deemed necessary for our review of his severance and instruction contentions.

Martin subsequently submitted Appellant's Supplemental Appendix (Supp.App.) containing the hearing transcript on Martin's motion to sever counts; twenty-three pages of excerpts of trial transcript; and the court's jury instructions. We have carefully reviewed the Supp.App. and now address the two issues on rehearing.

I.

Martin contends that the district court erred in denying his motion for a severance of counts.

Fed.R.Crim.P. 8(a) governing the joinder of offenses provides in part: "Two or more offense [sic] may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or

are . . . parts of a common scheme or plan." Fed.R.Crim.P. 14 governing relief from prejudicial joinder provides in part: "If it appears that a defendant or the government is prejudiced by a joinder of offenses . . . in an indictment . . . the court may order an election or separate trials of counts. . . . " The decision whether to grant or deny severance is in the sound discretion of the district court and will not be disturbed on appeal unless there is an affirmative showing of abuse of discretion. *United States v. Hollis*, 971 F.2d 1441, 1456 (10th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1580, 123 L.Ed.2d 148 (1993).

Martin and co-defendant Robert Wood were charged in Count I of possession with intent to distribute more than 100 kilograms of marijuana. Martin was charged in Count II of carrying and using a firearm in relation to a drug trafficking offense. Prior to trial, Martin moved for a severance of counts and Wood moved for a severance of defendants. During a hearing on these motions, Martin argued:

> MR. ABRAHAM (Defense Counsel):
>
> We have filed a motion for severance of counts for the reason that with regard to the first count of the indictment, the possession of marijuana with intent to distribute, the evidence, your Honor, that the Government would present is that Mr. Martin was the driver and sole occupant of a vehicle that contained 495 pounds of marijuana in the back end of a camper shell. The evidence with regard to the possession with intent to distribute the marijuana charge would be one that would be ample evidence by the Government to show that Mr.

Martin, perhaps, did possess the marijuana with intent to distribute it.

Mr. Martin chooses, your Honor, to not take the stand in connection with that charge. He would rely upon his Fifth Amendment rights. He would require that the Government prove the case against him beyond a reasonable doubt. And therefore, your Honor, would not take the stand in connection with that charge.

However, with regard to the second count of the indictment, that is the possession of the firearm during a drug trafficking offense, he does choose to take the stand. He does choose to take the stand and tell the ladies and gentlemen of the jury that he did not possess the weapon, nor did he carry it or use it for the purpose in a drug trafficking offense.

Our position is, your Honor, then basically what would happen is Mr. Martin would not be able to take the stand in the defense of his case, because I feel certain that the Government would then make inquiry of Mr. Martin during the cross-examination of the charges with regard to the possession with intent to distribute the marijuana. And those are the charges, your Honor, that he wishes to claim his Fifth Amendment privilege on. And that's the basis of my motion.

(Supp.App., Tab 1 at 4-5).

Following the hearing, the court denied Martin's motion:

THE COURT:

. . . All right, I'll deny the motion to sever the counts and sever the parties. In my discretion

> and judgment, I think the case can be adequately and properly presented in a joint trial. And I will take every step necessary to protect the rights of the defendants. All rights of the defendants. And I think I can do so in a joint trial. So the motions will be denied.

(Supp.App. Tab 1 at 8-9).

On the first day of trial, Martin filed a motion in limine requesting that his co-defendant and the government be restricted from asking him any questions "as to any licenses of firearms with regard to Count I of the indictment." (Supp.App., Tab 2 at 4). The court, after observing that "I know of no authority in support of that position," *id.* at 5, denied the motion. After the government rested, Martin renewed his motions for a severance of counts and motion in limine. *Id.* at 52. The court denied both motions. *Id.* at 54. Martin then testified.

After both parties had rested Martin made the following arguments in chambers:

> MR. ABRAHAM:
>
> After the close of all of the evidence, it now appears that the co-defendant was permitted to cross-examine Mr. Martin on Count I of the indictment as well as the Government was able to do that. And based upon those factors, and having filed my motion in limine and the motion to sever the counts of the indictment, we feel that Mr. Martin was prejudiced by these factors for the reason that he was relying upon the Fifth Amendment and his right to not incriminate himself by and through his own mouth, by not taking the stand on Count I of the

> indictment but was able to present good testimony and testimony that was fruitful with regard to Count II of the indictment. That is, that the gun in question was not his gun, that it was his father's gun and that he was not intending to use it in any way in a drug trafficking offense. And it did not play a role, nor was it an integral part of a drug transaction.

(Supp.App., Tab 2 at 63-4).

Before the case was submitted to the jury, Martin renewed his motion for a severance of counts and the motion in limine. The court again denied the motions. The jury returned verdicts of guilty on both counts.

Martin contends that the denial of his severance motion "forced [him] to testify at trial and convict himself as to the drug count in an attempt to win an acquittal of the gun count." (Appellant's Opening Brief at 18). Martin further contends that inasmuch as he "had both important testimony to give concerning one count and a strong need to refrain from testifying on the other," *id.* at 18-19, the district court's refusal to sever the counts deprived him of a fair trial. The government responds that a decision to grant or deny a severance will not be disturbed on appeal absent an affirmative showing of an abuse of discretion; the burden on the defendant in this context is a difficult one; and that inasmuch as the evidence and theories of the two counts were interconnected, the district court did not abuse its discretion in denying Martin's motion to sever Counts I and II.

"The defendant bears a heavy burden of showing real prejudice from the joinder of the two counts." *United States v. Holland*, 10 F.3d 696, 699 (10th Cir.1993), *cert.*

denied, ___ U.S. ___, 114 S.Ct. 739, 126 L.Ed.2d 702 (1994), quoting, *United States v. Muniz*, 1 F.3d 1018, 1023 (10th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 575, 126 L.Ed.2d 474 (1993). In establishing real prejudice, the defendant must "demonstrate that the alleged prejudice he suffered outweighed the expense and inconvenience of separate trials." *United States v. Parra*, 2 F.3d 1058, 1063 (10th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 639, 126 L.Ed.2d 597 (1993).

Significantly, Martin does not challenge the sufficiency of the evidence underlying Count II. Martin's contention that he was prejudiced because he wished to remain silent on one count but testify and mount a defense on another count, was addressed in *United States v. Cox*, 934 F.2d 1114, 1119-20 (10th Cir.1991):

> Defendant alternatively argues that he was prejudiced because he wished to remain silent on counts one and two (the marijuana offenses), but testify and mount an entrapment defense on counts five through eight (the other drug offenses). When the district court refused to sever these offenses, defendant was forced either to testify or to remain silent on both counts.
>
> In *Valentine*, 706 F.2d at 291, [*United States v. Valentine*, 706 F.2d 282 (10th Cir.1982)] we discussed what a defendant who wishes to remain silent on some counts and testify on other counts must do before he is entitled to a severance under rule 14:
>
> > "[N]o need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give

> concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information – regarding the nature of the testimony that he wishes to give on one count and his reasons for not wishing to testify on the other – to satisfy the court that the claim of prejudice is genuine and to enable it to intelligently weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying."

Under *Cox* and *Valentine*, no need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. Applying these standards to our case, we hold that Martin failed to demonstrate a convincing need for a severance.

During the motion hearing, Martin did notify the court that he would refrain from testifying on Count I because "the evidence . . . that the Government would present is that Mr. Martin was the driver and sole occupant of a vehicle that contained 495 pounds of marijuana . . . would be ample evidence by the Government to show that Mr. Martin, perhaps, did possess marijuana with intent to distribute it." (Supp.App., Tab 1 at 4). However, Martin did not make a convincing showing that he had important testimony to give concerning Count II, which charged him with carrying and using a firearm during a drug trafficking crime in violation of § 924(c)(1).

Rather, Martin related only that he would take the stand and testify "that he's not guilty of that offense, that he did not possess the weapon, nor did he carry it or use it for the purpose in a drug trafficking offense," (Supp.App., Tab 1 at 4), and "that the gun in question was not his gun, that it was his father's gun and that he was not intending to use it in any way in a drug trafficking offense." (Supp.App. Tab 2 at 63-4). We hold that such proffered testimony did not constitute the "important testimony" necessary to establish a need for a severance under *Cox* and *Valentine* because the evidence was convincing that Martin was the sole occupant of the vehicle containing the 495 pounds of marijuana charged in Count I and the user of the semi-automatic Colt pistol charged in Count II.

Section 924(c)(1) applies to a person who " 'uses or carries' a firearm during and in relation to a drug trafficking crime." *United States v. McKinnell*, 888 F.2d 669, 674 (10th Cir.1989). Under § 924(c)(1) a defendant uses a firearm when it "(1) is readily accessible, (2) is an integral part of the criminal undertaking, and (3) increases the likelihood of success for that undertaking." *United States v. Holland*, 10 F.3d at 699, quoting *United States v. Conner*, 972 F.2d 1172, 173 (10th Cir.1992).

Martin's "important testimony" under *Cox* and *Valentine*, necessarily would have had to relate to proof that the weapon was not clearly accessible, not an integral part of the undertaking, and that it did not increase the likelihood of success of the criminal undertaking. Neither Martin's original Appendix nor his Supp.App. indicate that any such evidence was forthcoming. Under these circumstances, we hold that Martin failed to establish the

need for a severance and that the district court's denial of his motion for a severance of counts did not constitute an abuse of discretion.

II.

Martin contends that the district court erred by failing to give his requested jury instruction. We "examine jury instructions as a whole to determine whether the jury was provided with an accurate statement of the applicable law." *United States v. Self*, 2 F.3d 1071, 1089 (10th Cir.1993), citing, *United States v. Harmon*, 996 F.2d 256, 257 (10th Cir.1993) (citations omitted). We will reverse a conviction due to an erroneous instruction only if the error was prejudicial when viewed in light of the entire record. *United States v. Cara*, 965 F.2d 1548, 1555 (10th Cir.1992).

After both parties had rested, the court inquired if there were any objections to the instructions. Martin responded:

> MR. ABRAHAM:
>
> Yes, Your Honor. I have two. With regards to the Court's instruction page six, the objection that I have, Judge, is that under 924-C-1, the Court has set out the elements for the offense. And not only that, the Court tells the jury and describes for the jury the word "use" and the word "firearm." And although the statute says use or carry, there is no definition of carry. And what I have done, Judge, is, I have submitted to the Court a statement concerning the carrying of a firearm in relation to the commission of a drug-trafficking crime. And I have said that the

term "carries" means possession with the ability to exercise dominion and control of such proximity to make it available for use. "Carry" does not mean mere transportation of a firearm in a vehicle.

The Court has described and defined for the jury all of the terms of the statute with the exception of carry, and we feel that carry should be defined for the jury.

* * *

And then I have submitted to the Court the defendant's requested instruction concerning the New Mexico law with regards to the carrying of a deadly weapon.

(Supp.App., Tab 2 at 65-7).

The district court's instruction on § 924(c)(1) provided in part:

Title 18, United States Code, Section 924(c)(1), makes it a crime for anyone to use or carry a firearm during and in relation to a drug trafficking crime.

For you to find the defendant David Joe Martin guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant, David Joe Martin, committed the crime alleged in Court I. I instruct you that possession with intent to distribute more than 100 kilograms of marijuana is a drug trafficking crime: and

Second: That the defendant, David Joe Martin, knowingly used or carried a firearm during

> and in relation to the commission of the crime alleged in Count I.
>
> The government is not required to prove that the defendant actually fired the weapon or brandished it at someone in order to prove "use", as that term is used in this instruction. However, you must be convinced beyond a reasonable doubt that the firearm played a role in or facilitated the commission of a drug offense. In other words, you must find that the firearm was an integral part of the drug offense charged.

(Supp.App., Tab 3 at 6).

After the court had instructed the jury, Martin made the following objection:

> MR. ABRAHAM:
>
> I have an objection, Your Honor, with regards to the Court's instructions. The Court failed to give to the ladies and gentlemen of the jury the defendant's requested instruction pertaining to possession or carrying a deadly weapon; and furthermore the Court has failed to give to the jury the jury instructions with regards to 9-24C(1) [sic] that I have submitted; more specifically, Your Honor, with regards to the definition on "carrying." The Court failed to give that and we feel the Court should have done that.

(Supp.App., Tab 2 at 110-11).

We have carefully examined the instructions as a whole, reviewed the challenged instruction together with Martin's objections thereto, and hold that the jury was "provided with an accurate statement of the law." *United States v. Self*, 2 F.3d at 108. The district court's refusal to

define "carrying" did not give rise to reversible error. See *United States v. Parrish*, 925 F.2d 1293, 1297 (10th Cir.1991) (we there recognized that while § 924(c)(1) identifies the using *or* carrying of a firearm in the disjunctive, whereas the indictment, as here, charged the using and carrying in the conjunctive, we will uphold the conviction if there is sufficient evidence to find that the defendant *either* carried *or* used a firearm in violation of section 924(c)(1) during the charged drug offense). *See also United States v. Gunter*, 546 F.2d 861, 868-69 (10th Cir.1976), *cert. denied*, 430 U.S. 947, 97 S.Ct. 1583, 51 L.Ed.2d 794 (1977).

In *McKinnell*, we held that a defendant "uses" a firearm within the meaning of § 924(c)(1) when he has "ready access" to the firearm, when the firearm is an integral part of the criminal undertaking, and its availability increases the likelihood that the criminal undertaking will succeed. There, the firearm was found under a shopping bag on the passenger seat next to McKinnell who was operating the vehicle when arrested. 888 F.2d at 674-75. And in *United States v. Bullock*, 914 F.2d 1413, 1416 (10th Cir.1990), we held that the "use" element of § 924(c)(1) is satisfied where, although the defendant did not have a firearm on his person, various guns were found " . . . in virtually every room of the house," and "the firearms were thus 'used.' "

Martin's proffered instructions on the law of New Mexico's relative to the carrying of a deadly weapon is not included in Martin's Appendix or Supp.App. Accordingly, we cannot consider his argument that the court's refusal to give the proffered instruction gave rise to reversible error. *Southwest Forest Industries, Inc. v. Sutton*, 868 F.2d 352, 356 (10th Cir.1989), *cert. denied*, 494 U.S.

1017, 110 S.Ct. 1320, 108 L.Ed.2d 496 (1990) (failure to designate the instructions as part of the record on appeal renders it impossible to review appellant's contention that the trial court failed to properly instruct the jury).

AFFIRMED.